U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4988924

Date: JAN. 6, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks an EB-2 immigrant visa to classify the Beneficiary as a physical therapist, as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director denied the petition, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage, and that the Petitioner did not establish that it provided proper notice of the filing of a labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. SCHEDULE A PETITIONS

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.[1] If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director denied the petition because the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is $80,000 per year.

[1] The priority date of the petition is December 12, 2016, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. Thus, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

The record indicates that the Petitioner is taxed as an S corporation. The Petitioner's 2016 federal tax return states net income[3] of $37,306, which is $42,694 less than the proffered wage. Therefore, for the year 2016, the Petitioner did not have sufficient net income to pay the proffered wage. As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's 2016 tax return states end-of-year net current assets of $10,198, which is $69,802 less than the proffered wage. Therefore, for the year 2016, the Petitioner did not have sufficient net current assets to pay the proffered wage.

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[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Dec. 12, 2019). In this case, the Petitioner's net income is found on line 18 of Schedule K of its Form 1120S.

[4] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. We note that although the Petitioner used the accrual method of accounting in 2016, its only current asset was cash and it listed no current liabilities that year, including no accounts payable.

As noted by the Petitioner on appeal, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). The Director reviewed the totality of the circumstances and determined that the Petitioner had not established its continuing ability to pay the proffered wage. The Petitioner asserts on appeal that, similar to the petitioner in *Sonegawa*, it has established its ability to pay based on the totality of the circumstances.

In this case, the record indicates that the Petitioner was established in December 2011. Therefore, it had only been in business for five years at the time the petition was filed in December 2016. In *Sonegawa*, the Petitioner had been in business over 11 years at the time of filing the petition. *Id.* at 614. Thus, at the time of filing, the Petitioner had been in operation less than half of the time of the petitioner in *Sonegawa*. Further, although the Petitioner's gross income increased each year from 2012 to 2016, it paid no salaries in 2012, 2013, and 2014, and it paid minimal salaries in 2015 and 2016. It had only one employee at the time of filing the petition. In contrast, the petitioner in *Sonegawa* paid wages to four regular employees and four part-time employees. *Id.* at 615. Thus, the Petitioner here had 25% of the number of full-time employees as in *Sonegawa*, and it had no part-time employees, at the time of filing. Further, unlike the petitioner in *Sonegawa*, the Petitioner here has not established its reputation in its industry. The petitioner in *Sonegawa* was a well-recognized fashion designer whose designs had been published in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. She lectured in fashion design at fashion shows and at colleges and universities. *Id.* The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business status and outstanding reputation as a couturiere. The Petitioner here has not demonstrated a similar magnitude of business activities. Further, the Petitioner here has not demonstrated that the Beneficiary will replace a current employee or outsourced service. Instead, the Petitioner plans to outsource the Beneficiary's services to another employer.

On appeal, the Petitioner asserts that in 2016, it spent $17,653 for medical supplies that it claims were not annual, recurring expenses because they have a shelf life of seven years. It states that it only spent $3,164 in medical expenses in 2015, which is "a more accurate recurring figure." Thus, it asserts that the 2016 expenses were extraordinary expenses that reduced the Petitioner's profitability. In *Sonegawa*, the petitioner changed business locations and paid rent on both the old location and new location for five months during the year in which the petition was filed. She also incurred large moving expenses and was unable to do regular business for a period of time. *Id.* at 614. The uncharacteristic circumstances in *Sonegawa* are not analogous to the situation here. The Petitioner offers physical therapy services and it purchased medical supplies related to those services. The Petitioner has not established that the medical supplies were uncharacteristic expenses. It also asserts that it paid its attorney $6,000 in 2016 to pay for the immigration process, and that this expense was not a recurring expense. However, legal expenses incurred in connection with an employment-based immigrant petition are not the type of uncharacteristic expenses contemplated by *Sonegawa*. Additionally, even if we accepted that the medical and legal expenses were uncharacteristic expenses in 2016, the combined amounts would not be sufficient to overcome the deficiencies in the Petitioner's 2016 tax return.

On appeal, the Petitioner also asserts that it has contracted with [redacted] for placement of the Beneficiary at its facility. It asserts that [redacted] will pay it $45 per hour for the Beneficiary's services. It states that the Beneficiary will be able to use [redacted]'s facilities and the tools and equipment that [redacted] provides to its therapists in its facilities to treat its patients. It states that the Beneficiary will generate $93,600 in annual income for the Petitioner and lead to continued growth for the company, and that the annual expenses associated with the Beneficiary's employment would be approximately $7,500, including costs for liability insurance, worker's compensation, health insurance, payroll taxes, and supplies. Thus, it states that the anticipated annual net income from the Beneficiary's employment with [redacted] will be $86,100, which is more than the proffered wage. It cites to *Sonegawa* for the proposition that its expectation of a continued increase in business and increasing profits based on the Beneficiary's third- party placement demonstrates its ability to pay the proffered wage. We disagree.

The Petitioner's calculation detailed above is based on the assumption that [redacted] will pay the Petitioner $45 per hour for 2080 hours of the Beneficiary's services each year. However, its staffing agreement with [redacted] does not obligate [redacted] to purchase any services from the Petitioner. Instead, the agreement simply states that the Petitioner has been engaged to provide an unspecified number of physical therapists to [redacted] at a rate of $45 per hour, with no guarantee as to the number of therapists to be provided or the number of working hours for each therapist. Therefore, the Petitioner's assertion that the Beneficiary will generate $93,600 in annual income for the Petitioner is without merit.

Further, the Petitioner indicated that the annual expenses associated with the Beneficiary's employment include costs for liability insurance, worker's compensation, health insurance, payroll taxes, and supplies. However, the record does not include an employment agreement between the Petitioner and the Beneficiary showing what benefits, if any, the Beneficiary will receive. Pursuant to the affidavit from [redacted]'s owner submitted on appeal, the Petitioner is required to pay for the Beneficiary's transportation expenses, and those expenses were not included in the Petitioner's calculation. Thus, the Petitioner's calculation of expenses is incomplete.[5] Further, it does not appear that the Petitioner has calculated the full amount of additional costs in employing the Beneficiary, which may include legally required benefits (social security, Medicare, federal and state unemployment insurance), employer costs for providing life and disability insurance benefits,[6] paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings, and supplemental pay. Therefore, the Petitioner has not established that that the Beneficiary's proposed employment will increase the Petitioner's income.

On appeal, the Petitioner also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989),[7] to support its assertion that the Beneficiary's proposed employment will increase the Petitioner's income. Although part of that decision mentions the ability of a beneficiary to generate

[5] The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[6] The staffing agreement between the Petitioner and [redacted] states that the Petitioner is responsible for insurance to comply with all federal state and local statutes, rules, and regulations.

[7] We are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[8] Further, as set for the above, the Petitioner has provided insufficient evidence to show how the Beneficiary's potential assignment as a physical therapist with [redacted] will significantly increase income for the Petitioner's business. The Petitioner's unsupported assertions do not outweigh the evidence presented in its tax returns, which are not sufficient to establish its continuing ability to pay the proffered wage.

We note that in *Sonegawa*, the Regional Commissioner indicated that the petitioner would substantially increase her business with the addition of an authentic oriental clothing designer from Japan, "not only in the actual number of clients but also to the type of customer who is willing to pay a higher price for authentic Japanese designs and patterns." *Matter of Sonegawa*, 12 I&N Dec. at 614. The expectation of a continued increase in business and increasing profits were directly tied to the Beneficiary's employment in the petitioner's custom dress shop. Here, the Petitioner plans to outsource the Beneficiary to another employer and, therefore, it has not demonstrated that the Beneficiary will increase the Petitioner's number or caliber of physical therapy clients.

The Petitioner further asserts on appeal that the Petitioner's sole shareholder/officer is willing and able to forgo $25,000 of his officer compensation to pay the proffered wage.[9] The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. In the present case, the Petitioner asserts that we should examine the financial flexibility that the sole shareholder has in setting his salary based on the profitability of his physical therapy practice. However, $25,000 is insufficient to cover the deficiencies in the Petitioner's 2016 tax return. Further, the Petitioner has not established that the sole shareholder was able to forgo $25,000 in 2016. His personal tax return shows that his adjusted gross income was $89,546 in 2016, but the Petitioner did not provide the schedules to his tax return to demonstrate his personal expenses. It is not clear that he could have forgone over 25% of his income in 2016 to pay the proffered wage. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal, the Petitioner also cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), for the proposition that we should treat the shareholder's $25,000 pledge of officer compensation forbearance as evidence of its ability to pay the proffered wage. However, the decision in *Full Gospel* is not binding here. *See Matter of K-S-*, 20 I&N Dec. at 715. Further, as set forth above, the sole shareholder's pledge to forgo $25,000 of his officer compensation payments does not cover the deficiencies in the Petitioner's 2016 tax return and does not establish its ability to pay the

[8] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the beneficiary, and a petitioner's net income and net current assets.

[9] In 2016, he earned $52,240 in total officer compensation.

proffered wage.[10] Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Accordingly, after a review of the Petitioner's federal tax returns and all other relevant evidence, we conclude that the Petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition onward.[11]

III. NOTICE OF FILING

The Director also denied the petition because the Petitioner did not establish that it provided proper notice of the filing of a labor certification (Notice). *See* 20 C.F.R. § 656.10(d). However, because the Petitioner's inability to pay the proffered wage is dispositive in this case, we need not reach the issue of the Petitioner's Notice and therefore reserve it.

ORDER: The appeal is dismissed.

[10] The Petitioner also submits a letter from an enrolled agent stating that the Petitioner's sole shareholder made a $25,000 capital contribution in 2017 "to increase cash flow" and that this contribution could have been used to pay the proffered wage. However, contributions in 2017 do not establish the Petitioner's ability to pay in 2016. The record does not contain regulatory-prescribed evidence of its ability to pay the proffered wage from 2017 onward. *See* 8 C.F.R. § 204.5(g)(2).

[11] If the Petitioner pursues this matter further, it must demonstrate its ability to pay from 2016 onward.